

Sneller Verbatim/HDJ

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: J1301/98

at: 2000-06-23

In the matter between

RUFUS MOKGOTHU

Applicant

and

1<sup>st</sup> Respondent

2<sup>nd</sup> Respondent

COMMISSION FOR CONCILIATION

3<sup>rd</sup> Respondent

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J U D G M E N T

Delivered on 23 June 2000

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REVELAS J:

1. Rufus Mokgothu, the applicant, had been in the employ of the first respondent since 1982 when the latter terminated his services on 29 June 1996 for his participation in an illegal strike. Approximately 28 000 employees were dismissed.

Following the intervention of the then Minister of Labour,

Mr Tito Mboweni, an agreement was brokered between the various parties and concluded on 3 August 1996.

3. The applicant lists the salient points of the agreement as follows in paragraph 4 of his founding affidavit:

**"All ex-strikers who have not yet applied for employment may do so by Friday 16 August**

**1996 at the Recruitment Offices of their choice, and will be offered employment.**

**4.2 Applicants will be offered employment as the following time-table:**

**The first third of the unemployment ex-strikers will be offered employment by the end of September 1996;**

**the second third by the end of November 1996; and**

**the final third by the end of February 1997."**

4. The applicant duly applied for the position before the specified time, namely 16 August 1996, but was not offered re-employment in terms of to the predetermined table set out in the agreement, at any stage before 28 February 1997, which was the last of the predetermined dates in the agreement.
5. The applicant, prior to the agreement being reached, intended to challenge his dismissal in terms of the provisions of the former Labour Relations Act, 28 of 1956 (the former Act), as it was the applicable legislation at the time of his dismissal.
6. Subsequent to the conclusion of the agreement, on 6 November 1996, the applicant applied for the establishment of a conciliation board which was established on 19 November 1996. These were remedies under the former Act.
7. In terms of the agreement the applicant had to apply for a position before 16 August 1996. In the first respondent's founding affidavit there is a rather faint suggestion that the applicant had not applied for a position before 16 August 1996. However, it is not categorically disputed by the first respondent that the applicant had done so as set out in his founding affidavit.
8. Once the application had been made, employees, (including the applicant), would have been offered re-employment. According to the first respondent, the applicant was not offered re-employment because he had challenged his dismissal by applying for the establishment of a conciliation board before he could be offered employment in terms of the

agreement.

st respondent submitted that the challenging of the

dismissal was contrary to the agreement concluded and the fundamental principles of the agreement was that ex-employees would be re-employed. This agreement, argued the first respondent, was in lieu of the individual employees challenging their dismissal. The first respondent further submitted that by applying for the establishment of a conciliation board, the applicant indicated his clear intention to challenge his dismissal as at 29 June 1996 and he therefore fell outside of the provisions of the agreement reached.

10. The respondent argued that the date on which the dispute arose is 29 June 1996 and well in advance of the implementation of ("the current Labour Relations Act, 66 of 1995, LRA"), namely 11 November 1996 and the dispute is therefore required to be processed in accordance with the transitional provisions contained in the LRA. The applicant argues that the dispute arose on 28 February 1997, the last date on which he could be re-employed.

11. The first respondent's stance was that because the applicant chose to challenge his dismissal - even after conclusion of the agreement - the applicant was precluded from any benefits in terms of the agreement and it was not applicable to him, despite him having applied for employment before 16 August 1996 as was required by the agreement.

12. On 19 August 1997, (almost seven months after the date on which the applicant argues the dispute arose), he referred the dispute to the CCMA which he described in the relevant referral form as a refusal to **"comply with the agreement signed on 3 August 1996"**.

13. On 12 September 1997 the matter came before the second respondent who issued a certificate to the effect that the dispute was "resolved" on the basis that the CCMA had no jurisdiction to hear the matter. The

second respondent provided no written reasons for his ruling. It appears that he held the view that the dispute arose prior to 11 November 1996, there before the current LRA become operative.

14. The applicant now seeks to set aside the certificate and ruling issued by the second respondent in terms of section 158(1)(g) of the LRA.

15. On the affidavits presented by both parties in this application, the second respondent based his ruling on the same facts and arguments presented to him by the parties which are now argued before me.

16. In my view, the second respondent came to his conclusion because he accepted that the dispute arose on 29 June 1996 and regarded that as the date on which the dispute arose, since that was the date of the dismissal of the applicant.

17. The applicant, instead of applying to the Labour Court to review the ruling in question - having been dissatisfied therewith - elected to refer the same dispute to the CCMA for a second time.

18. On the second occasion the characterisation of the dispute is set out with more detail in the relevant referral form and reads as follows:

- "1. Refusal to comply with the agreement signed on 2/8/96, which I complied with;**
- 2. unilateral changes determined with conditions of employment;**
- 3. unfair labour practice;**
- 4. a failure of employer to re-employ a former employee in terms of the agreement."**

19. The dispute referred to the CCMA for the second time by the applicant, remained the same dispute, irrespective of its somewhat new wording. The dispute is essentially about the failure to comply with the agreement concluded on 3 August 1996 between the relevant parties.

20. A conciliation meeting was set down for 6 November 1997 and a different commissioner heard the matter under the auspices of the CCMA. This commissioner also came to the conclusion in his advisory award that the dispute remained the same between the parties.

21. In his advisory award, the commissioner questioned the basis on which

the second respondent arrived at his conclusion that the CCMA lacked jurisdiction. By implication he expressed a different view regarding the date on which the dispute arose, but advised the applicant to request reasons from the second respondent for his ruling.

22. The applicant then entered into correspondence with the CCMA in an endeavour to seek clarity on what he terms **"the somewhat confusing and conflicting position adopted by the CCMA"**.

23. Several letters were written by the applicant to the CCMA over a protracted period. None were answered.

24. The applicant had also changed his address in the interim, which could possibly explain the CCMA's omission to deal with the applicant's enquiries.

25. The applicant's last letter to the CCMA was written on 18 March 1998.

26. On 20 August 1998, almost nine months after receipt of the advisory award, and almost five months after his last letter to the CCMA, the applicant wrote to the registrar of the CCMA.

27. The registrar, on 1 September 1998, advised the applicant that the second respondent's ruling was final and confirmed that the CCMA does not have the necessary jurisdiction to hear the matter.

28. The applicant was also advised that his remedy was to either refer the dispute to the Industrial Court or to apply for a rescission of the ruling. A third choice offered by way of poor advice, was that he could apply to the Labour Court to have the review set aside in terms of section 145 of the LRA.

29. The applicant wrongly elected to apply for a rescission of the second respondent's ruling. He has up to date received no reply.

### **30. The delay:**

The second respondent made his ruling to the effect that he had no jurisdiction to hear the matter on 12 September 1997. At that stage the

dispute was, on the applicant's case at least, almost seven months old.

31.The applicant served this application for the review of the ruling only in March 1999, almost eighteen months later.

32.There is no proper condonation application before me. I permitted the applicant's legal representative to make such an application from the Bar and decided the matter on the facts that could be gleaned from the affidavits of the parties.

33.In *Ruijgrok v Foschini (Pty) Ltd and Another* 1999 (20 ILJ) 1284 Labour Court, Basson J was of the view that the Labour Court -

**"...may legitimately take notice of the fact that a review application of an arbitration award must be brought within a mere six weeks after such award was served.**

**Further, it is important to take notice of the fact that the principle that the CCMA is obliged to decide unfair dismissal disputes expeditiously is borne out by the provisions of the Act relating specifically to time periods in the case of conciliation proceedings..."**

34.Basson J also found (in the same judgment) that a delay of six months in bringing an application to review conciliation proceedings of the CCMA is "unreasonable" (at 1287I-1288B).

35.There has been an inordinate delay in bringing this review application. Even though I am of the opinion that much of the delay was caused to some extent by the manner in which the CCMA officials dealt the matter, the applicant is nevertheless also to be blamed for the delay.

36.There is no proper explanation proffered by the applicant as to why he waited seven months to refer the dispute to the CCMA in the first place. The fact that he, during this period, made several enquiries from the first respondent as to why he was not re-employed, does not constitute an explanation in itself. If the applicant was not satisfied with his employer's attitude, he could none the less have pursued his remedies in terms of the LRA.

37.On the probabilities, the applicant was clearly aware of his rights in

terms of the LRA, because he abandoned the route he pursued under the former Act. On his own explanation this was because he realised the dispute between the parties arose at a date which occurred after the implementation of the current Act, which was 27 February 1997. Why he should have waited eighteen months to bring the review application, is difficult to understand.

38.If the applicant was not satisfied with the ruling of the commissioner he should have brought the review application much sooner. Instead, he referred the same dispute for a second time to the CCMA, which he was clearly not entitled in law to do. The CCMA could to some extent be blamed for misguiding the applicant by entertaining this issue. I also accept that the advisory award was of little assistance to the applicant, but the applicant had a duty to seek proper advice.

39.He had worked in an industry where several unions represented employees. He could have asked any of these unions for assistance. Alternatively, he could have made personal visits to the CCMA and obtained clarity instead of entering into correspondence with them, interspersed by long intervals between letters. Particularly in view of the fact that he had changed his address, he was obliged to do so. Months and eventually more than a year had passed by. Time was passing by and the applicant should have realised that he could not pursue a matter against his erstwhile employer at such a protracted pace.

40.In my view, it would be extremely prejudicial to an employer if its employees were entitled to bring review applications of CCMA rulings eighteen months after the event. The reasons therefore are obvious. Litigants in labour matters are entitled to expect an end to a litigation, or that their disputes are resolved at some point. The Act also requires disputes to be resolved expeditiously.

41. In so far as the merits of this matter are concerned and thus the

prospects of success, the following is significant..

41. There are instances where, when a commissioner of the CCMA makes a ruling as to whether he/she has jurisdiction to conciliate and/or arbitrate a dispute, the merits of the matter has to be entered into. Evidence has to be considered and arguments have to be considered. In this particular matter where the date of dismissal or the date on which the dispute arose was not common cause, it is rather unfortunate that the second respondent did not give reasons for his ruling.

42. It may or may not be that the second respondent erred in law in coming to the conclusion that he did. That is also not *per se* a ground for review. Then there is also the possibility that the applicant elected not to be re-employed by referring a dispute prematurely. But, even if the applicant has a prospect of success in this regard, these prospects are outweighed by the degree of lateness in bringing the review application.

43. In the circumstances the application should fail.

44. Insofar as the question of costs is concerned I have to take into account, that the applicant, in order to pursue his matter, was misguided by the CCMA to some extent. I agree with the applicant that the CCMA, at times at least, adopted a confusing approach to the matter. The applicant should have been advised by the CCMA at the onset of the matter that its rulings were binding and that he should apply to have the matter reviewed. Clearly, to have advised the applicant that he should apply for rescission, was the wrong advice. This is a consideration when taking into account the factors in determining a costs order.

45. In the circumstances, I do not make any costs order against the applicant.

46. I make the following order:

The application is dismissed and there is no order as to costs.



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E. Revelas

nt: Mr Segoale of Segoale Att.

ent: Adv. Ross Hulton, instructed by

Leppan Beach Att.